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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 823

PAN AMERICAN PETROLEUM CORPORATION, *Petitioner*,

v.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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BRIEF OF RESPONDENT IN OPPOSITION

This proceeding derives from a common law action commenced in the United States District Court for the District of Nebraska, its jurisdiction having been based upon diversity of citizenship.

The action was brought by a buyer of natural gas (Respondent) against the seller (Petitioner) to recover $20,238.31 plus interest. This amount represented payments for gas at a rate in excess of that fixed by contracts between the parties. The overpayments

were made under protest under the compulsion of a state minimum price order which was subsequently held invalid and void *ab initio.*

The District Court, having tried the action on the pleadings and a stipulation of facts, gave judgment for the plaintiff (Respondent). (R. 78-98).

The United States Court of Appeals for the Eighth Circuit affirmed the judgment. 297 F. 2d 561 (1962).

There is no reason why the Supreme Court should issue a writ of certiorari to review that decision. On the contrary, the petition should be denied because:

(a) The decision of the Eighth Circuit is not in conflict with the decision of any other court of appeals on the same matter;

(b) No important question of federal law is involved;

(c) No federal question has been decided in a way in conflict with any applicable decision of this Court;

(d) There has been no departure from the accepted and usual course of judicial proceedings.

QUESTIONS PRESENTED

1. Does a state minimum price order which has been held to be a complete nullity *ab initio* nevertheless impose a price increase on the buyer above the price fixed by contract as a result of the Federal Power Commission's acceptance for filing of the void order, along with the contracts, for limited purposes?

2. Can a United States District Court, having jurisdiction by reason of diversity of citizenship, properly

decide in a common law action that a buyer of natural gas is entitled to recover amounts paid under protest in excess of the contract price under the compulsion of a totally invalid state minimum price order?

STATEMENT

During the period 1949-1952, Respondent and Petitioner entered into three contracts for the purchase of natural gas from the Kansas Hugoton Field for transmission and resale in interstate commerce by Respondent. (R. 19) One of the contracts, entered into in 1950 and stipulated by the parties as representative of the others (R. 28, 30), established a contract price (found to be in effect on June 7, 1954; R. 114) of 7.5¢ per MCF (thousand cubic feet) at a pressure base of 16.4 p.s.i.a. (pounds per square inch absolute). The contract also provided:

> "If the Kansas Corporation Commission, the Federal Power Commission, or any other governmental agency, whether State or Federal, *having competent jurisdiction*, at any time during the term of this contract fixes or determines a higher price for gas in the Kansas Hugoton Field than is set forth in this Section 1, (a), (b) and (c), the Buyer shall pay Seller the price thus fixed or determined, provided, however, that the price to be paid by Buyer to Seller shall at no time during the contract period hereof be less than the price set out. . . ." (Stip. Ex. H; R. 49) (Emphasis added.)

On December 2, 1953, the Kansas Corporation Commission purported to establish a minimum price of 11¢ per MCF at 14.65 p.s.i.a. for natural gas from the Hugoton Field. (R. 19) Respondent and Cities Service Gas Company promptly instituted proceedings in

a Kansas state court to review this order. (R. 19-20) Respondent, in order to minimize expenses and upon assurances that the test litigation would be continued, subsequently withdrew, without prejudice, from the proceedings. (R. 31)

On February 18, 1954, Respondent sent Petitioner a letter indicating its continued objection to the increased rate, stating in pertinent part:

> "During the period of appeal and pending final judicial determination of said Order, beginning January 1, 1954, Kansas-Nebraska Natural Gas Company, Inc. intends to pay for all gas purchased by it in the Kansas Hugoton Field in compliance with said Order. This compliance, however, is made to avoid any penalties or actions under the laws of Kansas for any violation, and all payments made to you in compliance with said Order, pending its final judicial determination will be paid to you under protest and as involuntary payments on our part, all without prejudice to our rights.
>
> "Should the said order be modified or declared invalid either in whole or in part, any and all overpayments made to you by virtue thereof shall be due and owing the Kansas-Nebraska Natural Gas Company, Inc. In event of any such overpayments, the amount shall be withheld from subsequent payments in the event you have not made full settlement of any overpayment." (Stip. Ex. B; R. 36; R. 3)

Checks subsequently tendered Petitioner by Respondent referred to this letter and were accepted by Petitioner. (R. 20)

By this Court's decision in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), sales of natural gas by so-called "independent" producers such as Peti-

tioner for resale in interstate commerce were brought under the jurisdiction of the Federal Power Commission under the Natural Gas Act. As a result, the Commission on July 16, 1954, issued its Order No. 174 (18 CFR 154.91, *et seq.*), requiring all "independent" natural gas companies:

(1) to obtain from the Commission certificates of public convenience and necessity before engaging in any transportation or sale of natural gas;

(2) to file with the Commission schedules (defined in the order as "the basic contracts and all supplements amendatory thereof, effective and applicable on June 7, 1954") showing all rates and charges incident thereto; and

(3) to file with the Commission all subsequent rate changes.

The Petitioner accordingly submitted to the Commission the three contracts with Respondent, each accompanied by a copy of the Kansas Corporation Commission Order and a sample billing showing compliance with the order. (R. 26-30 and Stip. Ex. F, H and I; R. 44-50) These were accepted for filing by the Commission, which wrote Petitioner as follows:

> "This acceptance for filing shall not be construed as a waiver of the requirements of Section 7 of the Natural Gas Act, as amended; *nor shall it be construed as constituting approval of any rate, charge*, classification, or any rule, regulation or practice affecting such rate or service *contained in the rate filing . . . .*" (R. 27-30 and Stip. Ex. L; R. 54) (Emphasis added.)

Subsequently, on December 8, 1956, the Kansas Supreme Court sustained the 11¢ minimum price order in proceedings resulting from the review originally sought

by Respondent and Cities Service, as carried on by the latter. *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 180 Kan. 454, 304 P. 2d 528. This Court reversed that decision, holding the 11¢ order invalid. *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 355 U.S. 391 (1958). And, on April 11, 1959, the Kansas Supreme Court held that the effect of this Court's action was to render the 11¢ order void *ab initio*. *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 184 Kan. 540, 337 P. 2d 640, *cert. den.* 361 U.S. 836 (1959).

By letters dated January 23, 1958 and February 18, 1958 (R. 34-35 and Stip. Ex. DD and EE; Supp. R. 9-12), Respondent notified the Petitioner of its intention to recover the contract overpayments made under compulsion of the invalid 11¢ order. Petitioner denied Respondent's right to recovery, whereupon Respondent instituted the action in the District Court.

SUMMARY OF ARGUMENT

As permitted by the Natural Gas Act, Respondent and Petitioner entered into contracts for the sale of natural gas for transmission and resale in interstate commerce. These contracts were filed with the Federal Power Commission and have been in full force and effect at all times. Compelled by the state minimum price order subsequently determined by this Court and the Supreme Court of Kansas to be invalid and void *ab initio*, and under protest, Respondent temporarily paid Petitioner for gas at rates in excess of the contract price. Respondent had to sue to recover the overpayments which amounted, in all, to a little over $20,000.

Petitioner's sole defense was that because the minimum price order was filed with the Federal Power Commission along with the contracts, as required by law, the minimum price order, though void *ab initio*, established a higher rate as the "only legal rate," and one which superseded the contract prices. This is argued notwithstanding the denial by the Federal Power Commission that its acceptance for filing of a tendered rate schedule had any such result.

Absent affirmative Commission action other than mere acceptance for filing, no price except the contract price is established between the parties under the Natural Gas Act, and neither this Court nor any other court has ever suggested a different result.

There is thus no basis under Rule 19 of this Court for the granting of a writ of certiorari.

ARGUMENT

1. No Question of Great Judicial Moment Is Presented By This Case Because, in Allowing Respondent to Recover Protested Overpayments Made Under Compulsion of the Invalid Kansas Minimum Price Order, the Eighth Circuit Merely Enforced the Contracts Filed With the Federal Power Commission According to Their Terms, Consistent With Principles Established By This Court and the Commission Under the Natural Gas Act

Order No. 174 of the Federal Power Commission required the filing of "the basic contract and all supplements or agreements amendatory thereof . . ." (R. 41). Petitioner complied by filing (a) the contracts between the parties, (b) the 11c minimum price order of the Kansas Corporation Commission later held null and void, and (c) a sample billing showing Respondent's compliance with the 11c order, all of which the Commission accepted for filing. However, the Commission by letter to Petitioner clearly indicated the

limited significance of such acceptance, including the caveat "nor shall [such acceptance] be construed as constituting approval for any rate [or] charge. . . ." For, as explained in 1955 by the Commission in *Cities Service Gas Company*, 14 F.P.C. 134, at 143:

> "Acceptance of a rate schedule for filing does not involve a determination by the Commission of a substantive nature, nor does it indicate approval of the level or form of the rates set forth, or of the conditions of service. Such acceptance is a procedural matter wherein the person or company involved is informed that the rate schedule filed satisfies the formal requirements of Sections 154.92(b) and 154.93 of the Commission's Regulations."

But Petitioner refuses to recognize such a limited significance in the Commission's acceptance for filing of a rate schedule. Petitioner's argument, in essence, is that its filing of the invalid minimum price order (in addition to the contracts) with the Federal Power Commission under the Natural Gas Act established the higher rate set by the order as the rate effective between the Respondent and itself, notwithstanding the fact that Respondent has never consented to a revision of the contract rates, absent the compulsion of a *valid* state minimum price order. But this Court has clearly held that the fact of filing under the Natural Gas Act does not in and of itself convert a rate into a federally-imposed or even federally-sanctioned rate. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corporation*, 350 U.S. 332 (1956); *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958); *cf. Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

In *Mobile*, a case arising under the Natural Gas Act, the Court of Appeals for the Third Circuit, one judge

dissenting, reversed a Federal Power Commission order denying a non-consenting buyer's petition to reject the seller's tender of a schedule establishing a unilateral rate, and not only directed the Commission to reject the schedule (although previously accepted for filing), insofar as it purported to increase the rate in question, but also held that the buyer was entitled to a return of the amounts paid in excess of the contract rate. This Court affirmed the decision of the Third Circuit, holding "that the Natural Gas Act does not give natural gas companies the right to change their rate contracts by their own unilateral action." 350 U.S. 332, 337. In so deciding, the Court stated:

> "In construing the [Natural Gas] Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts. In this respect, the Act is in marked contrast to the Interstate Commerce Act, which in effect precludes private rate agreements. . . ." 350 U.S. 332, 338.

Respondent submits that its position is quite analogous to that of the buyer in *Mobile* seeking to prevent the imposition of a unilateral rate and that the principles set forth in that decision control here. It seems obvious that the contract rates indicated in the contracts filed with the Commission as in effect on June 7, 1954, but for the state minimum rate order, remain as the only agreed price between the parties upon the invalidation of the order, and that the filing of the subsequently invalidated order along with the contracts between the parties in no way detracts from this result.

But Petitioner argues that the Eighth Circuit erred in failing to apply another decision of this Court, *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951). However, upon analysis it is readily seen that it is Petitioner which is in error.

In *Montana-Dakota*, the plaintiff brought suit in the District Court in an effort to enforce rights alleged to arise *under the Federal Power Act*, 49 Stat. 863 *et seq.*; 16 U.S.C. § 791a *et seq.* By contrast, the action here is at common law to enforce contract rights. In *Montana-Dakota*, the court had to determine what, under the Power Act, were "reasonable" rates during a past period. The action here requires no comparable determination. In *Montana-Dakota*, the lower court purported to determine what the legally effective "reasonable" rate under the Federal Power Act had been, and to award to the plaintiff retroactive benefits to which it had no contractual claim, and which the Federal Power Commission had no authority to confer. In this case, the contracts between the parties fix agreed rates, requiring no determination of reasonableness by the District Court.

When placed in proper context, the statements quoted by Petitioner from the majority and dissenting opinions in *Montana-Dakota* lose their applicability to this case, and the conflict and uncertainties claimed by Petitioner with respect to the decision of the Eighth Circuit are shown to be nonexistent.

The problem here presented reduces itself to one calling only for the application of elementary common law contract principles. Thus no question of great judicial moment is presented to warrant review by this Court.

2. No Question of General Applicability to Federal Power Commission Rate Regulation Under the Natural Gas Act Is Presented By This Case Because, as Recognized by the Commission and This Court, Future Problems Incident to State Minimum Price Laws Are Effectively Precluded By This Court's Action in Invalidating Such Laws

In *Pan American Petroleum Corporation* v. *Superior Court of the State of Delaware for New Castle County*, 366 U.S. 656 (1961), on facts quite similar to those present here, this Court stated:

> "Petitioners contend that to permit the state courts to entertain the suits brought by Cities Service will jeopardize the uniform system of regulation that Congress established through the Natural Gas Act. *Apart from other considerations that dispel such fears*, it should be remembered that the route to review by the Court is open to parties aggrieved by adverse state-court decisions of federal questions. . . ." 366 U.S. 656, 665. (Emphasis added.)

It is submitted that one of the "other considerations" noted by the Court in that case and equally present in this one might well be the fact that the issues formally raised by state minimum price orders in the natural gas area no longer present significant problems.

But for the imposition of the Kansas minimum price order the question of contract overpayments would not have been raised and the contractual relationship between the Respondent and Petitioner would have remained undisturbed. Since this Court, by its decisions in *Natural Gas Pipeline Co.* v. *Panoma Corporation*, 349 U.S. 44 (1955), and *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 355 U.S. 391 (1958), has effectively precluded other attempts at

similar state legislative action, the problem presented by this case will not occur in the future.[1]

The Federal Power Commission has adopted this position. By an order dated February 7, 1962 (27 Fed. Reg. 1368, Feb. 14, 1962) the Commission terminated proposed rulemaking proceedings looking to the amendment of the Commission's general rules to provide for rejection of any tender for filing pursuant to Section 4 of the Natural Gas Act to the extent that such filing was based upon a state-prescribed or attributed minimum price. The order says:

> "We believe that at this late date a rulemaking proceeding would be a cumbersome and inappropriate means by which to exercise our jurisdiction over the matters involved herein. Such matters can more conveniently be decided when properly raised in individual proceedings before us. We recognize, moreover, that a buyer of natural gas who has paid seller on the basis of a state minimum price law has an adequate remedy in an appropriate court in the event that his contract entitles him to a refund as a result of the invalidity of the state minimum price laws [citing *Pan American Petroleum Corp. v. Superior Court of Delaware for New Castle County* 366 U.S. 656 (1961)]. Furthermore, with respect to future rate filings the question appears to be moot for to the best of our knowledge there are no longer any state minimum price laws in effect. We conclude therefore, that the above-entitled proceeding should be terminated."[2]

---

[1] Petitioner's references to 12,000 rate schedules and 627 rate increases accepted for filing in fiscal year 1961 (Pet. p. 8, fn. 4) are, therefore, irrelevant and misleading.

[2] To prevent undue prejudice to the cause of any private litigant by reason of this statement, the Commission, on March 14, 1962 (27 Fed. Reg. 2657, Mar. 21, 1962), issued an order to clarify the

3. The Decision of the Eighth Circuit in the Proceeding Below Does Not Conflict With the Decisions of Other Circuits

The Tenth and Third Circuits have both considered the effect of filing an invalid state minimum price order with the Federal Power Commission under the Natural Gas Act and both courts have concluded, consistent with the decision of the Eighth Circuit in the proceeding below, that the fact of filing does not preclude recovery of any contract overpayments collected pursuant to the invalid order. *Cities Service Gas Company* v. *Federal Power Commission*, 255 F. 2d 860 (10 Cir. 1958), *cert. den. sub nom. Magnolia Petroleum Co.* v. *Cities Service Gas Co.*, 358 U.S. 837 (1958); *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 253 F. 2d 3 (3 Cir. 1958), *cert. den. sub nom. Dorchester Corporation* v. *Natural Gas Pipeline Co.*, 357 U.S. 927 (1958).

It is true that the proceedings in both of those cases took the form of a review of Federal Power Commission action, the courts having ruled as a condition pre-

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sentence in that order, quoted above, recognizing the buyer's remedy against the seller. The amending order states in pertinent part:

> "That sentence was not intended to express or imply any view as to whether contract actions in appropriate state or federal courts might be subject to defenses other than defenses based on the Kansas minimum rate order itself. To avoid doubt on that score, we hereby amend the above quoted sentence to read as follows:
>
> "'We recognize, moreover, that a buyer of natural gas who has paid seller on the basis of a state minimum price law can invoke the jurisdiction of an appropriate court in the event that his contract provides for a refund if the state minimum price laws are held invalid.'" Citing *Pan American Petroleum Corp.* v. *Superior Court of Delaware for New Castle County*, 366 U.S. 656 (1961).

cedent to their jurisdiction that Commission acceptance of a rate for filing constituted final reviewable action. In the case below, of course, the proceeding by the Eighth Circuit was a review of a judgment on a common law contract claim originated in the United States District Court under its diversity jurisdiction. However, this presents no conflict between the circuits. Congress has authorized the Courts of Appeals to review certain actions of the Federal Power Commission, § 19 (b) of the Natural Gas Act, 52 Stat. 831 (1938), as amended, and this Court has expressly held that the state courts (and therefore the Federal District Courts exercising their diversity powers) may take jurisdiction "to hear and decide" claims for the recovery of natural gas contract overpayments so long as the claim is founded on common law theories of recovery. *Pan American Petroleum Corporation* v. *Superior Court of the State of Delaware for New Castle County*, 366 U.S. 656 (1961). Thus, there are alternate routes to relief in cases such as this one, controlled by the manner in which the aggrieved buyer casts his action.

Nor did the Courts of Appeals for the Tenth and Third Circuits purport to hold otherwise. In fact, both Courts in the above-cited decisions noted without any indication of disapproval that actions in the District Courts for recovery of contract overpayments were pending at the time of their decision.[3] Petitioner's claim of conflict here is clearly incorrect.

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[3] 253 F. 2d at p. 5, fn. 5; 255 F. 2d 860, 861. *Signal Oil and Gas Co.* v. *Federal Power Commission*, 238 F. 2d 771 (3 Cir. 1956), cited by Petitioner, does not bear on the problem at hand, the Third Circuit there having mentioned in passing only that the rate schedule filed as per agreement of the parties constituted the lawful rate. This is undisputed.

But Petitioner also purports to find a conflict "at least in reasoning" between the Eighth Circuit decision in the proceeding below and decisions of the District of Columbia and Fifth Circuits.[4] Passing the fact that this Court resolves conflicting *decisions* not conflicting *reasoning*, the cited cases are irrelevant to the decision of the Eighth Circuit. They involved the right of the Federal Power Commission under the Natural Gas Act to control rate increases. This case involves the recovery of contract overpayments made under the compulsion of an invalid state minimum rate order.

Petitioner refers to *Atlantic Refining Company* v. *Public Service Commission*, 360 U.S. 378 (1959) as "Another aspect of this conflict in reasoning. . . ." But the problems there considered are totally irrelevant to the present situation. There is here no disagreement between the parties or the courts that, absent the "conditioning" of a rate under a certificate of public convenience and necessity, the agreed contract price filed with the Commission becomes the established rate unless the Commission declares it unreasonable. The present question, rather, is the effect of filing *in addition to the contract* a state minimum price order subsequently determined to have been a nullity *ab initio*.

Finally, with regard to Petitioner's allegation that the Eighth Circuit "has erred by construing Commission orders to mean that the formal act of 'acceptance' under Sections 4(*e*) or 4(d) has no legal significance," the complete answer is that the Eighth Circuit made no such construction.

[4] *Episcopal Theological Seminary* v. *Federal Power Commission*, 269 F. 2d 228 (D.C. Cir. 1959), *cert. den. sub nom. Pan American Petroleum Corp.* v. *Federal Power Commission*, 361 U.S. 895 (1959); *Bel Oil Corp.* v. *Federal Power Commission*, 255 F. 2d 548 (5 Cir. 1958); *cert. den.* 358 U.S. 804 (1958).

CONCLUSION

As this case presents no constitutional issue, no question of great judicial moment and no conflict among the circuits, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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